STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

RODERICK LOUIS PIPPEN

Defendant-Appellant
_____/

Supreme Court No. _____

Court of Appeals No. 321487

Lower Court No. 10-6891-01

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
_____

KATHERINE L. MARCUZ (P76625)
Attorney for Defendant-Appellant
_____

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Roderick Pippen appeals from the January 14, 2016, Court of Appeals Opinion affirming his convictions.

The courts below committed two major analytical errors common to ineffective of counsel cases—the use of hindsight to supply a tactical decision an attorney could have made, but plainly did not, and the application of an impossible prejudice standard, requiring a showing far outside *Strickland's* requirement that counsel's error undermine confidence in the outcome in the proceeding.

Roderick Pippen was convicted of felony murder and other crimes[1] and sentenced to life without parole. Mr. Pippen maintains his innocence.

The prosecution's case centered on the dubious testimony of Sean McDuffie, who claimed to be a witness to the crime, and who was absolved of his own legal troubles in exchange for his cooperation. Police approached McDuffie after ballistic evidence demonstrated that a gun found in connection to Mr. Pippen on October 18, 2008, was the same weapon used in an attempted car-jacking on July 21, 2008. The record reflects that this gun changed hands multiple times and there is no independent evidence that Mr. Pippen possessed this gun prior to or around the time of the shooting.

An evidentiary hearing was held in the trial court pursuant to Mr. Pippen's motion for new trial.[2] The sole issue presented at the hearing was whether Mr. Pippen's trial counsel was constitutionally ineffective in failing to interview Michael Hudson, a purported res gestae witness to the shooting. According to Sean McDuffie, he and Michael Hudson were driving around with Mr. Pippen when Pippen, without warning, shot the decedent. As a direct result of counsel's failure to

[1] Felon in possession of a firearm and felony firearm.
[2] References to the evidentiary hearing are abbreviated as "EH" followed by the volume and page number.

investigate, he did not call Mr. Hudson who would have testified as he did at the evidentiary hearing (EH, 31) that Sean McDuffie was lying, and that he had never witnessed Roderick Pippen shoot anyone.

At the hearing, trial counsel for Mr. Pippen acknowledged that he knew about Mr. Hudson and that Mr. Hudson was readily available, but stated he never spoke to him prior to trial as he "had no intention of calling him as a witness" because he "the way the facts looked, anybody who allegedly could have been placed in that car by McDuffie needed to be quiet." EH, 12-13; see also *Testimony of Luther Glenn*, attached as Appendix B. On cross-examination, trial counsel reiterated this reason. EH, 13. Thereafter, the prosecutor provided trial counsel with Mr. Hudson's affidavit (made post-conviction), asked him to review it, and then asked him to engage in hindsight: "Now that you've read Mr. Hudson's Affidavit, is there any reason you wouldn't have called him as a witness based on what he says in his Affidavit . . .?" EH, 16. Counsel responded that he would not have called Mr. Hudson as a witness because Mr. Hudson was arrested with Mr. Pippen when the alleged murder weapon was recovered; he "assumed" Hudson was not going to claim possession of the gun, and it was his strategy to "raise some type of doubt as to who actually had that weapon." EH, 17.

The trial court found that it was sound trial strategy not to call Michael Hudson and seized on the reason counsel provided when asked to speculate. EH3, 7. It did not address the defense's argument that trial counsel performed deficiently because he failed to conduct a reasonable investigation, nor did it make a finding that Hudson was not credible. On review, despite giving lip service to the fact that sound strategy must be based on a reasonable investigation, the Court of Appeals reached a similar conclusion.

Both the trial court and the Court of Appeals ignored the "strategic reason" counsel readily and repeatedly gave to both appellate counsel and the prosecutor and which captured his thinking at the time of trial, and instead endorsed speculation belied by the record. Despite counsel's representation that his trial strategy was to raise doubt about who dropped the weapon, he never once presented this theory at trial. Indeed, though the Court acknowledged that "an appellate court will not evaluate counsel's performance with the benefit of hindsight,"[3] it failed to scrupulously apply the law to the uncontroverted facts of this case.

The tactical considerations the trial court and Court of Appeals bestowed on trial counsel are exercises in "retro-speculative reasoning."[4] At the time Pippen's trial counsel decided not to investigate a potentially corroborating witness, he did not know what the state's case would be, he did not know what Hudson's potential testimony would be, and he had no sense of Hudson's credibility or persuasiveness as a witness. Counsel's decision not to speak to the only other alleged witness to this crime (who incidentally was not a witness for the prosecution or ever investigated by the police) was unreasonable.

In addition to the misuse of hindsight to characterize a failure to investigate as sound trial strategy, the Court of Appeals[5] committed another fundamental error inherent to ineffective assistance of counsel cases—the practice of downplaying the prejudicial effect of counsel's deficient performance by proposing every possible excuse for why it could not have made a difference.

The prejudice question before the Court was whether there was a reasonable probability that had the jury heard from Michael Hudson the result of the proceeding would have been different. Hudson was a key witness and his testimony was critical to this case. It directly contradicted Sean

[3] Slip op. at 2 (internal citations omitted).
[4] *Griffin v Warden, Maryland Corr Adjustment Ctr*, 970 F2d 1355, 1359 (CA 4, 1992).
[5] The trial court did not rule on the prejudice inquiry.

McDuffie who had incentives to lie and whose recollection of the incident was blatantly at odds with that of the witnesses in the victim's car. In revealing McDuffie to be a liar, Hudson's testimony tends to exculpate Mr. Pippen.

As the trial court acknowledged, "the prosecution's case essentially rested on the testimony of Shawn [sic] McDuffie" EH3, 4. Given the serious attacks on his credibility and the importance of Hudson's testimony, it is reasonably likely that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, Mr. Pippen would not have been convicted as charged. On this record, a reviewing court should not have any faith in the reliability of the verdict, or the proof of Mr. Pippen's guilt

The decision of the Court of Appeals is clearly erroneous and will cause manifest injustice to Mr. Pippen, the appeal concerns legal principles of major importance to the state's jurisprudence, and the opinion conflicts with decisions of this Court and of other panels of the Court of Appeals. MCR 7.302 (B).

For the reasons expressed in detail in the attached brief in support, this Court should either grant leave to appeal, or peremptorily reverse the decision of the Court of Appeals, and order a new trial for Mr. Pippen.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Pre-trial:

A Preliminary Exam was held on June 29, 2010. Mr. Pippen was bound over as charged and arraigned on the information before the Honorable Deborah Thomas on July 7, 2010. On September 1, 2010, Judge Thomas granted Mr. Pippen's Motion to Quash.[6] The court found that there were so many inconsistencies between the surviving victim and McDuffie's accounts of the incident that one could not reasonably conclude they witnessed the same shooting and, absent any other evidence that Mr. Pippen was involved, probable cause was not established. See Motion Tr. 9/1/10 at 8-10. The Court of Appeals reversed the trial court's order and remanded for further proceedings.[7] Mr. Pippen was re-arraigned on these charges on October 4, 2013. See Arraignment Tr. 10/4/13.

Trial:

The Crime

In the early morning hours of July 21, 2008, Brandon Sheffield was parked outside a friend's home on the east side of Detroit. He and three friends--Adam McGrier, Camry Larry, and Kyra Gregory--were seated in his Mercury Mountaineer, talking and watching rap videos on a laptop computer. T3, 48-49.[8] Ms. Larry testified that she was initially standing outside the Mountaineer and leaning in the open driver's side window, when a car passed by that caught her attention. T3, 49, 51. She observed four individuals in the car and noted that the man in the front passenger seat was leaning out the window with his face covered from the nose down. T3, 52. Ms. Larry then got inside the Mountaineer and the friends continued watching the video.

[6] At that time Mr. Pippen was represented by Randall P. Upshaw.
[7] *People v Pippen*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2011 (Docket No. 300171).
[8] References to the trial transcript are denoted by "T" followed by the volume and page number.

T3, 53.

About five minutes later a man approached the driver's side window. T3, 53. He had a "white thing" over his face, put a gun to Mr. Sheffield's head, and said "everybody get the fuck out the car." T3, 53-54. She described the man as tall, thin, and black, but could not say anything else about his appearance or the weapon. T3, 54-55, 60-62. As she was attempting to get out of the car she heard a shot. T3, 62-63. The car moved a few feet while she was still halfway inside; when it hit a tree and came to a stop she saw that Mr. Sheffield had been shot and she ran to safety. T3, 56, 65-66.

Ms. Gregory and Mr. McGrier also testified. T3, 74-89 (Gregory); T3, 90-108 (McGrier). Ms. Gregory did not remember seeing a suspicious car before the shooting and she was unable to describe the shooter other than to say that he was a male. T3, 83-85. When asked if the man was tall, she replied, "no." T3, 78. Mr. McGrier, who was in the passenger seat at the time of the shooting, remembered a car pulling up alongside of them with four individuals inside, all of whom were wearing all black including black masks or scarves. T3, 101.

All four of the people in the car had weapons. T3, 102. McGrier testified that the individual in the front passenger seat exited the car and approached Mr. Sheffield with a black "normal size" handgun. T3, 96. He described the man as approximately six feet tall with a thin build and wearing a black "mask hat." T3, 94, 105. When interviewed by police after the incident he told them that the man had a dark complexion. T3, 106. At trial he testified that he was unable to see the shooter's face or comment on his race or complexion. T3, 94.

Ballistic Evidence

On October 18, 2008, Mr. Pippen was arrested while walking on Seven Mile near Fairport Road. Sergeant Eric Bucy was patrolling the area with three partners in a semi-marked

police car when he saw Mr. Pippen standing with two other men, Michael Hudson and Norman Clark. T4, 11-12. Sergeant Bucy testified that when Mr. Pippen saw him he started walking east and the Sergeant was able to notice the butt of a handgun protruding from his waistband. T4, 13. Bucy then testified that he got out of his car and followed Mr. Pippen as he and Hudson stepped between two parked cars. T4, 14. While between the cars, Bucy saw Mr. Pippen take a handgun with a large magazine from his waistband and kick it under the car. T4, 14. He also witnessed Hudson drop and kick a different handgun, "a 38." T4, 14. Thereafter, Mr. Pippen and Mr. Hudson split ways. T4, 14.

Police apprehended Pippen, Hudson, and Clark, and then recovered two handguns from under the car, a black Glock nine millimeter with an extended magazine and a Bersa Thunder 380. T4, 14-15. Mr. Pippen was taken into custody. T4. 17. Hudson was also arrested, and Norman Clark was released without charges. T4, 17.

The parties stipulated that on January 27, 2009, Mr. Pippen admitted under oath to the Honorable Daniel Ryan that he was in possession of a firearm on October 18, 2008, in the area of Fairport and East Seven Mile Road in the City of Detroit. T1, 4.

Former Detective-Sergeant Ronald Ainslie was qualified as an expert witness in the field of firearms and toolmark identification. T3, 6. Ainslie testified that in 2009 he examined a nine millimeter Luger shell casing recovered from the inside of Mr. Sheffield's Mercury Mountaineer and then entered that shell casing into the Integrated Ballistics Identification System ("IBIS"). T3, 6-7. He also test-fired the nine millimeter Glock semiautomatic pistol obtained during the arrest of Mr. Pippen on October 18, 2008, and collected a shell casing. T3, 9-10. He then compared that casing to the Luger casing and determined that the two casings were fired from the same gun. T3, 10.

The Testimony of Sean McDuffie

Sean McDuffie was friends with Mr. Pippen, Michael Hudson, and Norman Clark. T4, 31-32. He testified that on August 25, 2009, Officer Mullins of the Detroit Police Department showed up at his home and wanted to talk to him. T4, 33-34, 53. At that time he was on Holmes Youthful Trainee Act ("HYTA") status for carrying a concealed weapon and that there was an open warrant out for his arrest for violation of HYTA. T3, 53-54. The police took him to the Homicide Department and asked him questions regarding "a whole bunch of shootings" and showed him pictures of homicide scenes. T4, 55-56. He also testified that the police showed him a sketch of a person and asked him "which one of [his] friends did it look like." T4, 66.

At some point during this conversation, Mr. McDuffie told police that one night in the summer of 2008 he was riding around in a car with Michael Hudson and Roderick Pippen—Hudson was driving and Mr. Pippen was in the front passenger seat. T4, 34. No one in the car was wearing masks or hoods at any point. T4, 42, 57-58. McDuffie testified that Mr. Pippen said that he saw someone he knew and asked Hudson to stop the car. T4, 34. According to McDuffie, Mr. Pippen then got out, walked over to the driver of a truck as if he was going to talk to him, and then shot him. T4, 34-35, 41. He saw people run and estimated there were a total of four people in the truck. T4, 39-40. Mr. McDuffie testified that Mr. Pippen got back in the car Hudson was driving and they drove to Mr. Hudson's cousin's house on Whitehill Street. T4, 35. He explained that he had no idea what the shooting was about and that neither he nor Mr. Hudson knew that it was going to happen. T4, 58-59.

Mr. McDuffie could not remember the type of car that Mr. Hudson was allegedly driving that evening or whose car it was. T4, 37. Nor could he remember exactly where or when this event happened, but stated that he believed it was near Morang, Kelly, or Houston Whittier and

that it was sometime after 10:00 p.m., sometime during the summer of 2008. T4, 39, 42. When asked whether the car rolled after the shooting or if it crashed into a tree, Mr. McDuffie testified that it did not. T4, 61, 66

McDuffie further testified that Mr. Pippen used a "Glock nine", but that it was not his gun and the gun belonged to someone named Darnell "Terry" Hicks who is now dead. T4, 37. When asked on cross-examination about his testimony at the Preliminary Examination that the gun belonged to Norman Clark, McDuffie responded that Norman bought the gun from Terry. T4, 65. Mr. McDuffie further testified that in exchange for his agreement to testify against Mr. Pippen he was released from HYTA probation. T4, 31. In Mr. McDuffie's words, they "cancelled" his CCW case. T4, 59.

Post-conviction proceedings

On December 12, 2014, Mr. Pippen filed a Motion for New Trial on the basis that trial counsel was ineffective for failing to investigate and present the testimony of Michael Hudson. A *Ginther* hearing was held on February 23 and 24, 2015, at which time testimony was taken from four witnesses.

Luther Glenn[9] was appointed to represent Mr. Pippen in this matter after the Court of Appeals reversed the circuit court's order granting Mr. Pippen's motion to quash the information and dismiss the charges. EH, 8. Mr. Glenn recalled that the prosecution's case against Mr. Pippen was circumstantial and that it "completely had to do with the credibility of [Sean McDuffie]." EH, 9. Mr. Glenn opined that Mr. McDuffie's testimony was the only testimony that pointed to Mr. Pippen, it was "dubious at best," and that he had "strong issues with Mr. McDuffie's credibility." EH, 9. His trial strategy for attacking Mr. McDuffie's credibility was to expose McDuffie's motivation for providing the police with information, which Glenn

[9] Mr. Glenn's complete testimony at the evidentiary hearing is attached as Appendix B.

believed extended beyond the deal he received in exchange for his testimony. EH, 10-11.

Mr. Glenn prepared for trial by reading the police reports, the transcripts of the Preliminary Exam, and the sworn testimony of Mr. McDuffie's pursuant to an investigate subpoena. EH, 11. He was aware that Sean McDuffie claimed that Michael Hudson was also a witness to the shooting, but he did not speak to Michael Hudson prior to trial. EH, 11-12. He did not contact him prior to trial because he had no intention of calling him as a witness: "the way that the facts looked, anybody who allegedly could have been placed in that car by Mr. McDuffie needed to be quiet." EH, 12. The first time Mr. Glenn spoke to Michael Hudson was during trial when Mr. Hudson was present to observe the proceedings. EH, 12.

Mr. Glenn testified that Mr. Pippen's family hired Miguel Bruce to investigate. EH, 12. He did not direct Mr. Bruce's investigation. EH, 12. He did not remember whether Mr. Bruce ever interviewed Michael Hudson but assumed that he did because Mr. Hudson was readily available. EH, 12. Mr. Glenn testified that he never talked to Mr. Bruce about what Michael Hudson's potential testimony would be. EH, 16.

Trial counsel had his own theory of the crime. He did not adopt the prosecution's theory of a "carjacking gone bad." EH, 13-15. Instead, he believed that the circumstances were indicative of an intentional shooting of a specific individual. EH, 13. When the prosecutor asked why he decided not to call Mr. Hudson as a witness (without ever speaking to him), Mr. Glenn responded, "[b]ecause looking at the circumstances of this case, if you're to believe Mr. McDuffie, Mr. Hudson was a get-away driver." EH, 13.

After reviewing Mr. Hudson's affidavit (made post-conviction) at the behest of the prosecutor, Mr. Glenn testified that based on Hudson's representations in the affidavit, he still would not have called him as a witness because Mr. Hudson was arrested with Mr. Pippen when

the alleged murder weapon was recovered, and it was his strategy to "raise some type of doubt as to who actually had that weapon." EH, 16-17. Specifically, Glenn testified that the officer saw Mr. Pippen with an extended clip from his waistband and approached him, but that he "didn't see anybody drop a gun or throw a gun, anything like that."[10] EH, 17. According to Mr. Glenn: "if Mr. Hudson is on the stand, I assume he would say that no the gun with the extended clip wasn't in his possession. It was in Mr. Pippen's possession." EH, 17.

Miguel Bruce has worked as a private investigator for the last ten years. EH, 18-19. Prior to opening his own private investigation company, Mr. Bruce was an officer in the Detroit Police Department for ten years where he worked in patrol, homicide, and the non-fatal shooting team. EH, 19. Mr. Bruce was hired by the Pippen family to investigate. EH, 20.

He met with Mr. Pippen's father and sister, who provided him with information about the case. EH, 20. He reviewed Mr. Pippen's discovery materials, the Preliminary Exam transcript, and Sean McDuffie's testimony obtained by investigative subpoena. He familiarized himself with the facts of the crime, the prosecution's theory of the case, and Sean McDuffie's version of events. EH, 20. As part of his investigation, Mr. Bruce interviewed Sean McDuffie. EH, 21. They discussed his statement to police and Mr. McDuffie informed Mr. Bruce that he wanted to do whatever he could to help Mr. Pippen. EH, 21.

Mr. Bruce interviewed Michael Hudson prior to trial. EH, 22. When Mr. Bruce asked Mr. Hudson about Sean McDuffie's story, Hudson told him that McDuffie was lying and that, "[i]t did not happen. He was not the driver. He was not involved with it." EH, 22. Mr. Bruce found Michael Hudson to be believable. EH, 23.

[10] Counsel's recollection of the evidence at trial is inaccurate. Sergeant Bucy testified at trial that he not only saw a large magazine in Mr. Pippen's waistband but that he also saw Mr. Pippen take the gun from his waistband, drop it to the ground, and kick it under the car. T4, 13-14. Sergeant Bucy also testified that he observed Mr. Hudson take a Bersa Thunder 380 out of his left pant pocket and drop and kick that gun under the same car. T4, 14-16.

He testified that Mr. Hudson was willing to be a witness for Mr. Pippen. EH, 23. Mr. Bruce relayed this information to trial counsel. EH, 24. Based on his conversations with Mr. Glenn, it was his impression that Mr. Glenn was going to contact Michael Hudson. EH, 25.

On cross-examination, Mr. Bruce acknowledged that he did not review Mr. Hudson's criminal history prior to interviewing him and was not aware of his prior convictions. EH, 27. Mr. Bruce was aware that Mr. Hudson and Mr. Pippen were arrested together three months after Mr. Sheffield was murdered and that one of the guns located at the time of that arrest was believed to be the murder weapon. EH, 27.

In October 2008, **Michael Hudson**, a longtime friend of Mr. Pippen, was arrested with him on Seven Mile in Detroit. EH, 30. He testified that they had just left the house and were walking to the gas station across the street when the police pulled up. EH, 35.

The police got out of the car and said "come here." EH, 35. Mr. Hudson kept walking across the street and dropped a .38 handgun underneath a car. EH, 35. EH, 35, 37. He was charged with carrying a concealed weapon and pled guilty.[11] EH, 30. Mr. Hudson did not see Mr. Pippen throw a gun underneath the car, but is aware that Pippen also faced gun charges as a result of that arrest and that he pled guilty as well. EH, 30, 35, 37.

Mr. Hudson has seen Mr. Pippen carry a gun before. EH, 37. Mr. Hudson carried a gun for protection and believed that Mr. Pippen also carried a gun for protection. EH, 38. Upon further questioning, Mr. Hudson explained that there is "a lot going on" in the neighborhood where they are from and that people carry guns to protect themselves and their family. EH, 38.

[11] Mr. Hudson has a prior criminal history. EH, 30. He acknowledged pleading guilty to three counts of larceny of a motor vehicle in 2005, one count of receiving and concealing stolen property motor vehicle in 2004, and one count of receiving and concealing stolen property motor vehicle in 2003. EH, 32-33.

At some point after October 2008, Mr. Hudson learned that Mr. Pippen had been arrested and charged with a homicide. EH, 30. He also found out that Sean McDuffie had told police that he saw Mr. Pippen commit the crime. EH, 31. Additionally, Mr. Hudson learned that McDuffie told police that the night this crime occurred he [Hudson] was driving the car and that he also witnessed the shooting. EH, 31. Mr. Hudson testified that none of this is true. EH, 31. He was never driving in a car with Mr. Pippen and Mr. McDuffie when Mr. Pippen asked him to stop the car then got out and shot someone. EH, 31. Mr. Hudson has never seen Mr. Pippen shoot anyone, ever. EH, 31.

Mr. Hudson informed multiple people that McDuffie was lying. EH, 32. He told the private investigator when they spoke prior to trial. EH, 32. He also told trial counsel when he got a chance to speak to him in the hallway during trial. EH, 32. Mr. Pippen's trial attorney never contacted Mr. Hudson prior to trial. EH, 32.

Likewise, Mr. Hudson was never contacted by the prosecution or the police. EH, 32. Mr. Hudson would have been willing to testify as a witness for Mr. Pippen. EH, 33. He attended Mr. Pippen's trial and he was present when Sean McDuffie lied under oath. EH, 33. Mr. Hudson is currently on parole and had violated his parole. EH, 40. He came to court to testify at the *Ginther* hearing knowing that it was likely that he was going to get arrested for the parole violation. EH, 40, 41. When asked why he was willing to put himself at risk of arrest, Mr. Hudson replied, "Because I know what Shawn [sic] McDuffie had told them is a lie, and even though I'm not charged or didn't have nothing to do with it, it's just crazy for me to just sit up here and not tell them that this is a lie." EH, 40.

Following Mr. Hudson's testimony, the prosecution called a rebuttal witness, **Bud Barnett** an investigator with the Absconder Recovery Team for the Michigan Department of Corrections. EH, 42. Mr. Barnett testified that the prosecutor contacted him a few weeks prior to advise him that Michael Hudson would be appearing in court on February 23, 2015. EH, 43. Mr. Barnett approached Mr. Hudson when he exited the building because he was concerned that Mr. Hudson might leave. EH, 43. At that time, Mr. Barnett told Mr. Hudson that there was a warrant for his arrest. EH, 44. He explained that as long as he stayed on the floor he could testify, but if he left he would be taken into custody. EH, 44.

The parties presented final arguments the following morning (February 24, 2015 ("EH2")). At that time the court adjourned in order to review the trial transcript prior to ruling. EH2, 23.

On March 13, 2015, Mr. Pippen filed a Supplemental Brief in support of the Motion for New Trial. On April 16, 2015, Judge Kenny issued his decision from the bench and denied Mr. Pippen's new trial motion. EH3, 1-8. Judge Kenny acknowledged that "the prosecution's case essentially rested on the testimony of Shawn [sic] McDuffie" and that Mr. McDuffie was "a key witness for the prosecution in terms of placing Mr. Pippen at the scene of the homicide." EH3, 4-5. He also opined that there was another key piece of evidence, almost 90 days after Mr. Sheffield's murder Mr. Pippen was observed discarding a pistol that forensic testing revealed to be the murder the weapon. EH3, 6.

After noting that it "must defer in many instances to the defense strategy if it is appearing to be a sound trial strategy" and cannot "second guess what the defense at trial could have done or should have done", the court found that:

> In this particular case Mr. Hudson getting on the stand to testify for the defense certainly would have corroborated Mr. McDuffie's testimony to the effect that Mr. Hudson, Mr. McDuffie, and Mr. Pippen certainly knew each other.
>
> Mr. Hudson's getting on the stand, I think, would have further accentuated the notion of the fact that the guns were in fact discarded by both Mr. Hudson and Mr. Pippen.
>
> It seems extraordinary to me that Mr. Hudson would have sought claim or claimed that he was the one who discarded the murder weapon, and it would have further corroborated the testimony of the officer who said it was Mr. Pippen who discarded the murder weapon.
>
> Mr. Glenn as trial counsel in this Court's view has, I think ample reason not to want to call someone like Mr. Hudson, who I think does equal damage to Mr. Pippen, compared to what benefit he might possibly bring.
>
> I think that it would be very sound trial strategy certainly not to call Michael Hudson to the stand.

EH3, 7-8; see also *Transcript Excerpt*, attached as Appendix C. The Court did not discuss the prejudice prong of the *Strickland* standard.

On January 14, 2016, after briefing by the parties and oral argument, the Court of Appeals issued a per curiam opinion affirming Mr. Pippen's convictions. Appendix A.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT THE TESTIMONY OF MICHAEL HUDSON, A CRUCIAL DEFENSE WITNESS. MR. PIPPEN IS ENTITLED TO A NEW TRIAL.

Issue Preservation and Standard of Review

Mr. Pippen filed a timely motion for new trial on the issue of ineffective assistance of counsel and thus preserved this issue for appellate review. *People v Wilson*, 242 Mich App 350, 352 (2000).

A defendant accused of a crime has the right under the federal and state constitutions to the effective assistance of counsel. US Const, Am VI; Const 1963, Art 1, § 20; *Strickland v Washington*, 466 US 668 (1984). Ineffectiveness claims present mixed questions of law and fact. *Strickland*, 466 US at 698; *People v LeBlanc*, 465 Mich. 575, 579 (2002). Questions of law are reviewed de novo. *LeBlanc*, *supra*. Questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc*, *supra*. A trial court's decision to grant or deny a new trial is reviewed for an abuse of discretion. *People v Terrell*, 269 Mich App 553, 558 (2010).

To prevail on an ineffective assistance of counsel claim, a defendant must meet two criteria. He must first "show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra*, at 687. In so doing, the defendant must rebut a presumption that counsel's performance was the result of sound trial strategy. *Id*. at 690. Second, the defendant must show the deficient performance was prejudicial. *Id*. at 687.

Prejudice is established where there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694; *People v LaVearn*, 448 Mich 207 (1995).

Discussion

Counsel performed deficiently because he failed to conduct a reasonable investigation and interview Michael Hudson, a purported res gestae witness to the crime who had never been interviewed by the prosecution or police. As a direct result of this failure, he did not call Mr. Hudson who would have testified that Sean McDuffie was lying, and that he had never witnessed Roderick Pippen shoot anyone. The jury was told repeatedly that Michael Hudson witnessed Mr. Pippen commit this crime, but they never heard from Michael Hudson. Had Michael Hudson had testified at trial as he did at the *Ginther* hearing, it is more than likely that the result of the proceedings would have been different.

A. Counsel performed deficiently in failing to investigate and present the testimony of Michael Hudson.

Generally, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey,* 237 Mich App 74, 76 (1999). However, in order to be a legitimate strategy, the decision must be made after counsel has investigated. *People v Trakhtenberg*, 493 Mich 38, 51-52 (2012), citing *Strickland*, 466 US at 690-691. Counsel must make 'an independent examination of the facts, circumstances, pleadings and laws involved . . . This includes pursuing 'all leads relevant to the merits of the case." *People v Grant*, 470 Mich 477, 486 (2004) (internal citations omitted). Strategic choices "made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* at 690-91. Counsel, in other words, "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

Here, counsel's decision not to talk to Michael Hudson prior to trial was plainly unreasonable. There is no question that trial counsel was aware of Mr. Hudson's existence and his potential importance—Sean McDuffie repeatedly identified him as the only other person, outside of the victims, who witnessed this event. And Mr. Glenn was very forthright in his testimony. He admitted that he knew about Mr. Hudson and that Mr. Hudson was readily available, but he never spoke to him prior to trial because he had already foreclosed the possibility of calling him as a witness. EH, 12. By means of explanation, trial counsel stated that anyone who could have been placed in that car by McDuffie "needed to be quiet" and that McDuffie had identified Mr. Hudson as the "getaway driver." EH, 12-13.

An assumption that witnesses will not be helpful or will refuse to testify is an unreasonable substitute for actual investigation. *See Ramonez v Berghuis*, 490 F3d 482, 489 (CA 6, 2007) (counsel was constitutionally deficient for not making reasonable efforts to interview witnesses before coming to his ultimate choice of trial conduct); *see also Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005) (a lawyer's *Strickland* duty "includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence."). If trial counsel had only engaged in the minimal and essential step of interviewing Mr. Hudson, he would have learned that contrary to McDuffie's claims, Hudson never witnessed the shooting death of Brendan Sheffield and he would have willingly testified in Mr. Pippen's defense.

When presented with Mr. Hudson's affidavit on cross-examination and asked to proffer other possible reasons why he may not have wanted to call Mr. Hudson as a witness, trial counsel offered that Mr. Hudson was with Mr. Pippen when he was arrested on gun charges in October 2008. Counsel explained that he sought to distance Mr. Pippen from the gun he had pled guilty to possessing and that he assumed that Hudson would not be helpful in that pursuit.

EH, 17.

Again, a purportedly strategic decision is not objectively reasonable when an attorney has failed to investigate his options and make a reasonable choice between them. *Strickland, supra* at 690-691; *Wiggins v Smith*, 539 US 510, 527-528 (2003). Counsel could not have evaluated or weighed the risks and benefits of calling Mr. Hudson as a defense witness without asking Mr. Hudson what he would say if called. *Towns, supra* at 260. Indeed, had counsel investigated his options he would have discovered that there was far greater value in effectively impeaching Sean McDuffie than hoping jurors would believe that the gun Sergeant Bucy testified he witnessed Mr. Pippen drop (T4, 14), and which Mr. Pippen subsequently pled guilty to, may have somehow been discarded by Michael Hudson instead. What's more, despite counsel's representation that "his whole point at trial was to say no, the murder weapon wasn't in Mr. Pippen's possession . . ." (EH, 17), he never once presented this theory during his closing argument (T4, 97-106).

Counsel acknowledged that Sean McDuffie was the prosecution's entire case and that his primary defense strategy was to impeach Sean McDuffie—an individual he considered to be patently incredible. EH, 9-10. Michael Hudson's testimony would have been the most direct and powerful way to accomplish this goal. Instead, defense counsel was relegated to attacking Mr. McDuffie's credibility on cross-examination by questioning him about the benefit he received in exchange for his testimony and eliciting the details of his story that contradicted the witnesses in the victim's car. T IV, 53-67. Given the circumstances surrounding this case and the import of Mr. Hudson's testimony, counsel's failure to investigate Mr. Hudson and produce him as a witness was constitutionally deficient performance—not a matter of trial strategy.

This case is analogous to *People v Grant, supra.* In *Grant*, the defendant had been convicted of three counts of criminal sexual conduct.

At trial, the main theory of the defense was that the victim had been injured not as a result of a sexual assault, but rather in a bicycling accident. Defense counsel, however, failed to interview witnesses who could have substantiated the bicycling accident, including the doctor who treated her and other children who had seen her bleeding. Instead, defense counsel counted on the child to recant on the stand, and merely argued that she had lied about the alleged assault. This Court concluded that a strategy based on challenging the credibility of the complainant, without taking the steps necessary to support this defense was unreasonable and rose to the level of ineffective assistance of counsel. Here, like in *Grant*, trial counsel's failure to properly investigate and substantiate his client's primary defense amounted to ineffective assistance of counsel.

The trial court erred in finding no deficient performance. Foremost, Judge Kenny failed to address the defense's argument that trial counsel performed deficiently because he failed to conduct a reasonable investigation and interview Michael Hudson—a fact that trial counsel readily admitted. Certainly, when determining whether counsel's performance was deficient, a reviewing court is required to defer to what was arguably sound trial strategy; yet it is well-settled that sound strategy must be based on a reasonable investigation. Indeed, trial counsel's decision not to investigate or call the only alleged res gestae witness to the crime because he *assumed* he would not be helpful was not reasonable and cannot be the foundation of a sound strategic decision.

What's more, trial counsel's testimony that he automatically foreclosed the possibility of Mr. Hudson as a defense witness because anyone who could have been placed in that car by McDuffie "needed to be quiet" was especially problematic. EH, 12-13.

For one, it demonstrated that counsel accepted Mr. McDuffie's version of events without "an independent examination of the facts [and] circumstances." *Grant, supra* at 486. Next, it is at odds with Mr. McDuffie's testimony and the prosecution's theory of the case—that both McDuffie and Hudson had nothing to do with the crime. Finally, and perhaps most importantly, it was Mr. Glenn's duty to properly investigate and substantiate his client's primary defense, not to protect Mr. Hudson.

In addition, the court's two suppositions as to why trial counsel would have not wanted to call Mr. Hudson (had he known that Mr. Hudson would directly dispute the testimony of Sean McDuffie) were unsupported by the evidence and counsel's clear trial strategy. EH3, 7-8. First, the court stated that, "Mr. Hudson getting on the stand to testify for the defense certainly would have corroborated Mr. McDuffie's testimony to the effect that Mr. Hudson, Mr. McDuffie and Mr. Pippen certainly knew each other." EH3, 7.

However, this is a fact that was never in dispute. At no point during Mr. Glenn's cross-examination of Sean McDuffie did he suggest that these three men were not friends, nor did Mr. Glenn ever testify at the *Ginther* hearing that this was a reason for not calling Mr. Hudson. Second, the court opined that "Mr. Hudson's getting on the stand, I think, would have further accentuated the notion of the fact that the guns were in fact discarded by both Mr. Hudson and Mr. Pippen" and that Hudson's likely unwillingness to claim that he was the one who discarded the murder weapon would have corroborated the testimony of the officer who said it was Mr. Pippen who discarded the murder weapon. EH, 7-8.

Again, the court's analysis is based on a misunderstanding of the evidence and counsel's apparent trial strategy. The prosecution presented overwhelming evidence that Mr. Pippen was in possession of the gun used to murder Mr. Sheffield three months earlier. Sergeant Bucy

testified at trial that he not only saw a large magazine in Mr. Pippen's waistband but that he also saw Mr. Pippen take the gun from his waistband, drop it to the ground, and kick it under the car. T4, 13-14. When presented with the Glock, Sergeant Bucy testified that it was the gun that he saw Mr. Pippen discard. T4, 15. Furthermore, Sergeant Bucy testified that he observed Mr. Hudson toss a different gun, which he identified as a Bersa Thunder 380. T4, 15-16. Additionally, the parties stipulated that Mr. Pippen pled guilty to possessing a firearm as a result of this incident. T1, 4. Moreover, counsel never once argued at trial that the murder weapon may have somehow been discarded by Michael Hudson instead.

In short, the strategic reasons the court provided for not calling Hudson to the stand are non-issues in this case and nothing more than post hoc rationalization of counsel's failure to investigate a relevant and meritorious purported witness to the crime. Mr. Hudson would not have damaged the defense's case by acknowledging that he and Pippen and McDuffie had been friends and that he was with Mr. Pippen the night Mr. Pippen was arrested with what was later discovered to be the murder weapon. On the other hand, Mr. Hudson could and would have testified that Sean McDuffie was lying and that he never witnessed Mr. Pippen shoot anyone. The benefit of his testimony far outweighed any conceivable damage, a reality that trial counsel did not know because, as he candidly admitted, he never spoke to Mr. Hudson prior to trial. EH, 12.

B. Trial counsel's failure to investigate and present the testimony of Michael Hudson prejudiced the defense.

Under Michigan law, the failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome. *Grant, supra* at 493; s*ee also People v Dixon,* 263 Mich App 393, 398 (2004) (counsel's failure to call a witness "constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense."); *People v*

Chapo, 283 Mich App 360, 371 (2009) (a substantial defense is "one that might have made a difference at trial.").

In light of the evidence presented at trial, there is a reasonable probability that the outcome would have been different had the jury heard from Michael Hudson.

This case boiled down to whether Sean McDuffie was telling the truth. It pivoted on the uncorroborated testimony of a single witness who had to be brought to court on a material witness warrant, and who received consideration in exchange for his testimony. Mr. McDuffie's testimony was fraught with problems. For one, it often lacked corroborating detail:

- Mr. McDuffie could not remember the type or color of car that he alleged Mr. Hudson was driving or whose car it was. T4, 37.

- Mr. McDuffie could not remember where or when this event happened, but stated that he believed it was near Morang, Kelly, or Houston Whittier and that it was sometime after 10:00 p.m. sometime during the summer of 2008. T4, 39, 42.

- Mr. McDuffie did not remember the victim's car rolling into a tree. T4, 61.

It also distinctly contradicted the testimony of the witnesses in the victim's car:

- Mr. McDuffie testified that there were three people in the car: Mr. Hudson, Mr. Pippen, and himself. T4, 59.

    - Ms. Larry and Mr. McGrier observed four individuals in the shooter's car. T3, 52, 101.

- Mr. McDuffie testified that no one in his car was wearing a mask or a bandanna and that no one in the car leaned out a window or displayed a weapon. T4, 57.

    - Ms. Larry testified that when the car first drove by the man in the front passenger seat was leaning out of the car and his face was covered from the nose down. T3, 52.

    - Mr. McGrier testified that three other men in the shooter's car were also wearing masks and all four of the men had handguns. T3, 101-102.

The defense strategy was to attack Mr. McDuffie's credibility and to argue that he had falsely accused Roderick Pippen of this crime to get out of his own legal troubles and to shift the focus of the homicide investigation away from himself. EH, 10-11.

Nevertheless, the attacks on Mr. McDuffie's credibility at trial were inconclusive. In his closing argument the prosecutor acknowledged Mr. McDuffie's lack of particularity (T4, 94) and the differences between his testimony and the testimony of Mr. Sheffield's friends (T4 93, 108), but averred that discrepancies in otherwise truthful testimony can be explained by the passage of time and the distorting effect of fear on one's memory (T4, 93).

Michael Hudson's testimony that he never saw Mr. Pippen shoot anyone, directly contradicts McDuffie's testimony at trial in a manner that tends to exculpate Mr. Pippen. If McDuffie lied under oath about Hudson being present, it stands to reason that he is lying about Mr. Pippen's involvement as well.

As this Court has recognized repeatedly, impeachment evidence is important. *See, e.g., People v Grissom*, 492 Mich 296 (2012); *People v Trakhtenberg*, 493 Mich 38 (2012); *People v Armstrong*, 490 Mich 281 (2011). And where impeachment evidence would have provided proof that a witness lied to the jury regarding his or her actions with regard to that very case, the fact that the witness' credibility had previously been attacked does not preclude a finding of prejudice. *See Armstrong*, 490 Mich at 292. On the contrary, there is a greater possibility that the additional attack "would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt." *Id; see also Trakhtenberg*, 493 Mich at 56 ("where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt.") (internal quotation omitted).

Here, as in *Armstrong* and *Trachtenberg*, Michael Hudson's testimony would have tipped the scales. It would have been actual evidence to the jury that Sean McDuffie was not merely misremembering a traumatic event that happened six years prior, but rather lying to this jury regarding his actions in connection with this case.

Outside of Sean McDuffie's testimony, the only evidence that Mr. Pippen committed this crime was that he fit an extremely vague physical description of the shooter and approximately three months after the shooting was in possession of the gun that was believed to be the murder weapon.

Mr. Pippen's possession of the weapon three months after the shooting is not overwhelming evidence of guilt such that Michael Hudson's testimony would not have made a different result likely. First, the passage of time is relevant. This is not a case where a defendant is apprehended with the murder weapon hours or days after an offense. Rather the circumstances around the discovery of this weapon do not tie Mr. Pippen to the crime in any way.

Second, there was no independent evidence that Mr. Pippen possessed this gun prior to or around the time of the shooting. Plainly this was not a gun that Mr. Pippen came to possess legally. Street guns, like this one, change hands. According to the prosecution's own evidence, the gun originally belonged to someone named Darnell "Terry" Hicks who is now dead. T4, 37. Then, Norman Clark, who was present when Mr. Pippen was arrested with the gun on October 18, 2008, bought the gun from Mr. Hicks. T4, 65. Mr. Pippen had no way of knowing everyone who possessed the gun before him or how it was used. Indeed, the fact that Mr. Pippen pled guilty to possession of the firearm strengthens the argument that he was not aware that the gun he possessed was a murder weapon. Defense counsel could have and should have argued to the jury that people typically do not hang on to guns they've used to commit a murder and they certainly do not plead guilty if they are caught with a gun they know to have been used in a

murder. The only evidence linking Mr. Pippen to this gun at the time of the shooting was Sean McDuffie.

Police first suspected Mr. Pippen in connection with the shooting after the IBIS results came back from the Michigan State Police indicating that the cartridge found in Mr. Sheffield's vehicle was a match with the gun seized in connection with his arrest on Seven Mile. T4, 74-75. They then went to Sean McDuffie who had a warrant out for his arrest (and who they were familiar with due to his cooperation with police on another homicide) and questioned him about "a whole bunch of shootings." PE[12], 60, 64-65, T4, 55-56, 75. They showed him pictures of the homicide scenes and a picture of Roderick Pippen and asked for information about Mr. Pippen's involvement in the Sheffield homicide, which Mr. McDuffie then provided. T4, 55-56, 74-75. He later attempted to withdraw his cooperation. PE, 49.[13] Notably, this is not a case where the gun evidence corroborated Mr. McDuffie's otherwise uncorroborated testimony. Indeed there is no other evidence tying Mr. Pippen to the gun at any time before October 18, 2008, or to the crime itself.

Nobody from Mr. Sheffield's car identified Mr. Pippen as the shooter. At trial, testimony was taken from the witnesses who were in the car with the victim: Camry Larry, Kyra Gregory, and Adam McGrier. Ms. Larry, who is 4 feet 11 inches tall, described the shooter as a tall and "little" black man. T3, 54. She agreed that both Mr. Pippen and Attorney Glenn fit this general description. T4, 55, 60. Ms. Larry never saw the man's face and she was unable to provide any other details about his appearance. T3, 61-62, 72. Ms. Gregory was seated in the front passenger seat. T3, 77.

[12] Preliminary Exam Transcript (6/29/10) abbreviated as "PE"

[13] Mr. McDuffie testified at the Preliminary Exam: "when I told them I wasn't telling them nothing they had took me down to Judge Kinny [sic]. And then he said they would lock me up for a year. And then after that they was going to charge me with perjury or something, which carries the same amount as the crime committed." PE, 49.

When asked if she could describe the man or if the man was tall, she replied, "no." T3, 78. Adam McGrier estimated that the man was about his height – six foot. T3, 94.

When Mr. McGrier spoke to police directly after the incident he described the shooter as having a dark complexion. T3, 106. At trial, he stated that he was not able to tell. T3, 105. The prosecution alleged that among Pippen, Hudson, and McDuffie, Mr. Pippen most closely fit the generic physical description of the shooter provided by Camry Larry. T4, 95. In a case where Mr. Pippen has consistently maintained that he was not present and not involved, this evidence is vague and unpersuasive.

Strickland teaches that some errors have "a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id*. at 695-696 (internal quotation omitted). The failure to adequately investigate and call Michael Hudson as a witness was the kind of error that altered the entire evidentiary picture. Given Mr. Hudson's testimony, there is a very real possibility that Sean McDuffie perjured himself on the stand and that Mr. Pippen had nothing to do with this offense. Considering the totality of the evidence in this case, there is a reasonable probability that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, Mr. Pippen would not have been convicted as charged. Mr. Pippen deserves the opportunity to present Michael Hudson's testimony to a jury and properly defend himself against these charges. Due process requires a new trial.

C. Errors in the Court of Appeals' analysis

The Court of Appeals reversibly erred by concluding that Mr. Pippen's trial counsel rendered effective assistance of counsel. Slip op. at 3. To the contrary, Mr. Glenn's failure to

investigate and failure to effectively impeach Sean McDuffie as a result constituted deficient performance and caused Mr. Pippen significant prejudice.

First, the Court of Appeals, like the trial court, discounted Mr. Glenn's testimony at the evidentiary hearing that the reason he elected not to investigate Hudson was because anybody McDuffie put in that car "needed to be quiet" and "if you're to believe Mr. McDuffie, Mr. Hudson was a get-away driver." EH, 12-13. A review of the transcript makes evident that *this* was Mr. Glenn's reason as to why an investigation was unnecessary. *Testimony of Luther Glenn*, attached as Appendix B. Indeed he gave the same explanation to the prosecutor on cross-examination and only offered another potential "downside" to calling Hudson as a witness after being presented with Hudson's Affidavit (made post-conviction) and asked to speculate.

Strickland and its progeny teach indulgence of on-the-spot decisions and warn against the use of hindsight in judging counsel's choices. Yet there is an important difference between the tolerance of tactical miscalculations and the fabrication of tactical excuses. *See Griffin*, 970 F2d at 1358-59, citing *Kimmelman v Morrison*, 477 US 365, 386-387 (1986) (hindsight cannot be used to supply a reasonable reason for decision of counsel). While reviewing courts are required to "indulge in a strong presumption that counsel's conduct falls within a range of reasonable professional assistance," they "may not engage in a post hoc rationalization of the counsel's decision making that contradicts the available evidence." *People v Gioglio* (On Remand), 296 Mich App 12 (2012) (internal citations omitted).

That is exactly what happened here. Counsel's testimony—that it was his trial strategy to "raise doubt" about who had the weapon and that Hudson would have eliminated that doubt by not taking ownership of the gun—was a post hoc rationalization that contradicts the trial record and the rest of his testimony at the evidentiary hearing. For one, contrary to Glenn's

recollection (EH, 16), the officer who arrested Mr. Pippen and Mr. Hudson *did* see someone drop a gun and was not ambiguous about who possessed what (T4, 13-16). Quite the contrary, he testified that he saw Mr. Pippen with the Glock in his waistband and then watched him discard it. T4, 13-14. Likewise, he stated that he observed Hudson drop a .38, which they recovered as well. T4, 14. More importantly however, despite Glenn's testimony that "[his] whole point at trial was to say no, the murder weapon wasn't in Mr. Pippen's possession . . . he never had the gun," (EH, 17) this argument was simply never made. Rather, the trial record indicates that Glenn's strategy was to attack Sean McDuffie's credibility.[14]

Even assuming trial counsel's decision not to speak to Michael Hudson was based on Hudson's presence at Pippen's arrest, "[t]he complete failure to investigate potentially corroborating witnesses can hardly be considered a tactical decision." *Harrison v Quarterman,* 496 F3d 419, 426 (CA 5 2007).

In implicitly finding that it was, the Court of Appeals' ignored the well-established jurisprudence of this Court and the United States Supreme Court requiring trial counsel to investigate the prosecution's case and to identify, interview, and present testimony from witnesses who might reveal weaknesses in the prosecution's case. *People v Trakhtenberg,* 493 Mich 38, 52-53 (2012) ("Counsel always retains the 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,'" including a duty to consult with key witnesses who would have revealed weaknesses of the prosecution's case.), citing *Strickland,* 466 US at 689 (1984); see also *People v Ackley,* 497 Mich 381 (2015).

Even where defense counsel's choice not to investigate might be seen as trial strategy, a court must determine whether "'strategic choices [were] made after less than complete

[14] As counsel stated at the evidentiary hearing when discussing the strength of the prosecution's case, "It had completely had to do with the credibility of the witness and that would have been Mr. McDuffie." (EH, 9).

investigation'" and whether the choice not to investigate is supported by "'reasonable professional judgments.'" *Trakhtenberg*, 493 Mich at 52, citing *Strickland*, 466 US at 104.

Notably, the Court of Appeals never directly addressed whether counsel's choice not to investigate was supported by "reasonable professional judgments." Rather, it deflects and turns the inquiry on Mr. Pippen, stating that there was "no testimony from either defendant or trial counsel at the *Ginther* hearing regarding what information, if any, defendant may have provided to counsel about the charges, or whether Hudson could provide defendant with a defense." Slip. op. at 3. It appears that the Court is suggesting without directly saying that Mr. Pippen may have disclosed to trial counsel that he or Hudson was present at this shooting. Had Mr. Pippen made an admission to his counsel that rendered investigation unnecessary, Mr. Glenn had every opportunity at the evidentiary hearing to say so. He did not. Rather, he only revealed his own cynicism and concern "as a criminal defense lawyer" for Mr. Hudson. EH, 12. It was Mr. Glenn's duty to conduct an independent investigation, not to protect Mr. Hudson.[15]

Such rank speculation only serves to obfuscate the real issue. Here, trial counsel Luther Glenn made no attempt whatsoever to contact Michael Hudson, despite the fact that Mr. Hudson was available, willing to testify, and his testimony tended to exculpate Mr. Pippen. Like in *Trakhtenberg*, the Court of Appeals "erred by failing to recognize that defense counsel's error was the failure to exercise reasonable professional judgment when deciding not to conduct any investigation." *Id* at 144. A "fail[ure] to exercise reasonable professional judgment when

[15] Appellate counsel can see no way in which Mr. Pippen's testimony would have aided the court in determining whether Mr. Glenn's decision not to interview Mr. Hudson was a reasonable professional judgment. The evidence presented at the hearing established that Mr. Glenn knew about Mr. Hudson, Hudson was available and wiling to testify, and Hudson's testimony was exculpatory. There was no indication that counsel was directed not to interview Mr. Hudson or led to believe that Hudson would not be a valuable witness. Furthermore, as recognized by the Court, the Pippen family hired a private investigator who interviewed Mr. Hudson.

deciding to forgo particular investigations relevant to the defense" constitutes deficient performance. *Id.*

The other reasons the Court of Appeals points to in its conclusion that it was reasonable for defense counsel not to call Hudson as a witness are no more strategic. First, the Court found that it was "reasonable to conclude that Hudson's credibility could be attacked." Slip op. at 3. This cannot be, in itself, a reason not to investigate a critical witness. If counsel does not speak to someone, then counsel "is ill-equipped to assess his credibility or persuasiveness as a witness." *Harrison v Quarterman*, 496 F3d 419, 426 (CA 5 2007) (internal citations omitted). Mr. Glenn made no effort to conduct any investigation into Mr. Hudson's credibility that could serve as sufficient basis for discarding Mr. Hudson's evidence of Mr. McDuffie's duplicity. Moreover, the trial court never found Hudson to be incredible.

In deciding whether or not to call Mr. Hudson as a witness, Mr. Glenn should have weighed the possibility for impeachment against the importance of the testimony, and considered that information in light of Sean McDuffie's utter lack of credibility. Counsel did not take the steps to assess Mr. Hudson's credibility, but even if he had, the failure to call Hudson as a witness under the circumstances is indefensible.

Next, the Court of Appeals assertion that Hudson's testimony "would minimally confirm that McDuffie was honestly testifying about who was present at the shooting and that Hudson and defendant were together three months later when the murder weapon was found" is nothing short of ridiculous. For one, the fact that Hudson and Pippen were together when Pippen was arrested for possessing the gun later discovered to be the murder weapon was never in dispute and is essentially background information, collateral to the issues at trial. More importantly, however, Hudson's testimony in no way confirms that McDuffie was "honestly testifying" about

who was present at the shooting. Indeed, it does the very opposite and that is why it is so important.

Additionally, the Court of Appeals failed to properly consider the prejudicial effect of Mr. Glenn's errors on Mr. Pippen's case. "Where there is relatively little evidence to support a guilty verdict to begin with . . . the magnitude of errors necessary for a finding of prejudice will be less than where there is a greater evidence of guilt." *Trakhtenberg, 493 Mich at 56,* citing *Brown v Smith*, 551 F3d 424, 434-35 (CA 6 2008); *Strickland v Washington*, 466 US at 696. Here, as the trial court acknowledged, "the prosecution's case essentially rested on the testimony of Shawn [sic] McDuffie." EH3, 4-5; see also *Excerpt of Trial Court Ruling*, attached as Appendix C.

Yet, as a result of Mr. Glenn's failure to investigate, Mr. Pippen was deprived of the opportunity to present favorable evidence to the jury that not only seriously impeached Sean McDuffie but tended to exculpate Roderick Pippen.

Moreover, the prejudice to Mr. Pippen through the ineffective assistance of his trial counsel was accentuated by the central role Hudson played (in absentia) in the prosecution's case. The jury was repeatedly told that both McDuffie and Hudson witnessed Mr. Pippen commit this crime. T2, 25, 27, 29, 35, Trial counsel's failure to have Hudson testify allowed the jury to draw a negative inference against Pippen based on Hudson's absence. See *Stewart v Wolfenbarger*, 468 F3d 338, 360 CA 6, 2007) (counsel prejudices his client's defense when counsel fails to call a witness who is central to establishing the defense's theory-of-the-case, and the jury is thereby allowed to draw a negative inference from that witness's absence).

Instead of acknowledging the critical nature of Hudson's testimony and the prejudicial effect of counsel's deficient performance, the Court of Appeals proposed every possible excuse for why it could not have made a difference, or worse, would have hurt the defense.[16]

As discussed in more detail above, Mr. Pippen's trial strategy was not to distance himself from the gun on October 18, 2008; rather, it was to show Sean McDuffie to be a self-interested liar. And this strategy was supported by the evidence. Hudson's testimony was not only consistent with Mr. Pippen's defense, it was necessary to it. Furthermore, the trial court did not find Michael Hudson to be incredible, and the Court of Appeals is not in a position to do so. Mr. Hudson's credibility should have been a question for the jury and it would have been weighed against Sean McDuffie's.

The Court's effort to devalue the importance of Hudson's testimony by looking for any potential point of impeachment is transparent and unpersuasive. First, it is worth noting that Mr. Hudson was a friend of both Roderick Pippen and Sean McDuffie. (EH, 29-30). Second, in finding fault with Hudson's testimony at the evidentiary hearing the Court mischaracterized the facts. Mr. Hudson did not "den[y] any knowledge of the Glock handgun seized by the police." Slip op. at 4. In truth, he was never asked about that handgun. Nor did he deny walking with Mr. Pippen when the police arrived. (See EH, 35 "We was walking to the store . . . we had just left the house. When we got to the corner, the police was pulling up.") The only thing Hudson testified to at the evidentiary hearing that was contrary to Officer Bucy's testimony at trial concerned what the two men did when they attempted to discard the guns. The officer recalled Hudson and Pippen stepping between two cars (T4, 13-14), while Hudson testified that when the

[16] These reasons fall into two groups: "Hudson would have strengthened the prosecution's evidence linking the defendant to the murder weapon" and "Hudson had his own credibility issues." Slip op. at 4.

police commanded them to stop they parted ways: "I walked between the cars. He walked that way." (EH, 36).

In short, there was nothing incredible about Mr. Hudson's account of the incident with police on Seven Mile.[17] He by no means suggested that Mr. Pippen did not discard a firearm—he merely stated that he did not physically see it happen. EH, 37.

It is not the Court's job to look at the prejudice inquiry from one side of the coin. While heavy, the *Strickland* prejudice standard is not tantamount to proving innocence beyond a reasonable doubt. The ultimate question is whether "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v Smith*, 539 US 510, 513 (2003).

Michael Hudson's testimony that he never saw Mr. Pippen shoot anyone, directly contradicts McDuffie's testimony at trial in a manner that tends to exculpate Mr. Pippen. Considering the totality of the evidence in this case, and McDuffie's credibility problems, there is a reasonable probability that had trial counsel conducted an adequate investigation and called Mr. Hudson as a witness, at least one juror would have struck a different balance.

To allow the Court of Appeals' decision to stand in this case would be manifestly unjust. MCR 7.302(B)(5).

[17] Mr. Hudson readily acknowledged that he was carrying a gun that evening, that he ran from police when they attempted to stop him, that he knew Mr. Pippen to carry a gun, and that he was aware that Mr. Pippen also pled guilty to gun charges following their arrest that day. EH, 30, 34-37.

SUMMARY AND RELIEF

Defendant-Appellant asks this Honorable Court to either grant this application for leave to appeal or any appropriate peremptory relief.

Respectfully submitted,

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_____

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